

NTSB Order No.  
EM-125

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 25th day of October, 1985

JAMES S. GRACEY, Commandant, United States Coast Guard,

vs.

ALBERT LEE CAIN, Appellant

Docket ME-114

OPINION AND ORDER

Appellant seeks review of a decision of the Commandant (Appeal No. 2385, dated March 20, 1985) affirming an order entered by Administrative Law Judge Roscoe H. Wilkes on June 5, 1984, following an evidentiary hearing.<sup>1</sup> By that order the law judge revoked appellant's merchant mariner's document (No. 538 56 9326) on finding proved the charge that he had been convicted in a state court of possession of heroin.<sup>2</sup> On appeal to the Board, the appellant challenges both the revocation of his document and the Commandant's refusal to allow him to apply for a new document before the expiration of the waiting period imposed by regulation on individuals whose documents have been revoked. For the reasons that follow we will deny the appeal.<sup>3</sup>

With respect to the contention that the Commandant abused his discretion by denying a waiver of the three-year waiting period applicable to appellant under 46 CFR 5.13-1(a), we find merit in the Commandant's position that the Board is not empowered to review such determinations. The Board's authority with regard to the certification of merchant mariner's limited by statute (49 USC 1903(a)(9)(b) to the review on appeal of "decisions of the

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<sup>1</sup>Copies of the decisions of the Commandant and the law judge are attached

<sup>2</sup>The conviction occurred on September 3, 1975 in the King County Superior Court in Seattle, Washington.

<sup>3</sup>The Coast Guard has filled a reply brief opposing the appeal.

Commandant ... on appeals from the orders of any administrative law judge revoking, suspending, or denying a license, certificate, document or register" in disciplinary proceedings convened pursuant

to Chapter 77, Title 46, United States Code.<sup>4</sup> and conducted in accordance with the hearing requirements of the Administrative Procedures Act.<sup>5</sup> Since a decision by the Commandant on a request for a waiver of or an exemption from a regulatory requirement does not involve an adjudicatory proceeding under any of the provisions enumerated in the statute as subject to Board review, it is not a determination over which the Board has jurisdiction.

Appellant next contends that the Commandant, for a variety of reasons, abused his discretion by the decision to initiate the revocation proceeding. As discussed below, we find no merit in this contention.

Appellant appears to concede that whatever discretion the Commandant may have had after a hearing under 46 U.S.C. section 239b not to revoke the license, certificate or document of a seaman who had been convicted of a drug offense was eliminated by the enactment of 46. U.S.C.§7704(b).<sup>6</sup> He argues nevertheless that the Commandant may not act arbitrarily or capriciously in determining whether to prefer a charge that, if proved in a hearing, would require revocation. Appellant maintains that the decision to

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<sup>4</sup>The statutory provisions establishing the suspension-revocation authority of the Commandant, currently codified in 46 U.S.C.§§U.S.C.§§7701 - 7705, formerly appeared in 46 U.S.C.§§239 239a, 239b, and 216(b).

<sup>5</sup>See 5 U.S.C.§551,et seq.

<sup>6</sup>46 U.S.C.§7704(b) provides as follows:

"(b) if it is shown at a hearing under this chapter that a holder of a license, certificate of registry, or document issued under this part, within 10 years before the beginning of the proceedings, has been convicted of violating a dangerous drug law of the United States or of a State, the license, certificate, or document shall be revoked."

The statute that section 7704(b) replaced had provided in pertinent part, that the Commandant:

"may--

(b) take action ... to revoke the seaman's document of ... any person who ... within 10 years prior of the institution of the action, has been convicted ... of a violation of [a narcotic drug law]....

prefer charges in this instance was invalid because 1) it was inconsistent with legislative intent, 2) the Commandant has not adopted guidelines for exercising his discretion in bringing charges under 46 U.S.C. 7704, and 3) the punishment is disproportionate to the offense.

Appellant's contention that revocation in this case is inconsistent with the intent of the suspension-revocation laws essentially is based on his view that the Commandant cannot suspend or revoke a license, certificate, or document unless a seaman's conduct has been shown to have had an adverse affect on marine safety. Appellant's point is not well-taken. 46 U.S.C. 7703(1) does state that the Commandant's discretionary suspension-revocation authority is limited to those instances in which the seaman:

"... has violated or failed to comply with this subtitle or any other law or regulation intended to promote marine safety or to protect navigable waters."

However, the reference to the promotion of marine safety and the protection of navigable waters creates no evidentiary burden for the Coast Guard; rather, it simply establishes that the Commandant's power to suspend or revoke under section 7703 for alleged violations of law is limited to laws "intended to promote marine safety or to protect navigable waters".<sup>7</sup> This limitation on the Commandant's discretionary authority to suspend or revoke under section 7703(1) plainly has no bearing on his mandatory obligation to revoke for violations falling under section 7704(b).<sup>8</sup>

The contention that the decision to prefer the charge herein is infirm because the Commandant has not issued guidelines for exercising his discretion under the new statutes also is without merit. In the first place, as noted above, section 7703(1) which involves discretionary authority has no applicability to a

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<sup>7</sup>No such limitation appears in Section 7703(2), which authorizes suspension or revocation for "an act of incompetence, misconduct, or negligence." Such acts, when committed by a seaman while serving under the authority of a license or document, clearly are related to marine safety.

<sup>8</sup>Appellant's argument is not aided by the fact that section 7701(a) asserts that "the purpose of suspension and revocation proceedings is to promote safety at sea." Since sections 7701 and 7704 were enacted at the same time a legislative judgment clearly had been made that a revocation under the latter section is consistent with the purpose stated in the former section.

proceeding under section 7704.<sup>9</sup> In the second place, we do not agree with appellant that the Commandant has discretion under the statute not to prefer charges when he has reasonable grounds to believe that the statute is applicable to a specific seaman. The new statute unequivocally requires the revocation of the license, certificate, or document of any seaman who, after a hearing, has been shown to have been convicted of a drug law offense. It does not contemplate any discretionary exceptions to its reach.

Finally, the contention that revocation is too severe a sanction for the drug offense for which appellant was convicted must be rejected. Congress no doubt was aware that there would be a wide disparity in the seriousness of the drug law violations involved in the various state and federal convictions that could provide the basis for a proceeding under section 7704 and that some offenses would have occurred many years earlier, as was the situation with the instant appellant. It nevertheless made revocation mandatory on the establishment, in an appropriate proceeding, of any such convictions with a 10 year period.<sup>10</sup> As a result, in a proceeding under section 7704 a claim that the punishment or revocation does not fit the offense on which it is based cannot be entertained in light of the legislative resolution of that issue the statute embodies.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal is denied, and
2. The Commandant's order affirming the revocation of appellant's seaman's document by the law judge, under authority of 46 U.S.C. §7704, is affirmed.

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<sup>9</sup>In other words, contrary to appellant's argument, the Commandant is under no obligation in every case brought under section 7704 to "ensure that a revocation would be consistent with the purposes of 46 U.S.C. 7701(a): 'to promote safety at sea.'" As noted, supra, n. 6, a blanket determination that safety at sea would be promoted by revocations in accordance with the terms of section 7704(b) already has been made by the Congress.

<sup>10</sup>Whatever harshness there may appear to be in a revocation for drug law convictions that might be deemed to fall at the less serious end of the spectrum is counterbalanced by the discretion given the Commandant under section 7701(c) to issue a new license, certificate, or document where doing so would be compatible "with the requirements of good discipline and safety at sea."

BURNETT, Chairman, GOLDMAN, Vice Chairman and BURSLEY, Member of the Board, concurred in the above opinion and order.